

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
HOFFINGER INDUSTRIES, INC.	:	DETERMINATION
A/K/A LOMART INDUSTRIES, INC.,	:	
AND MARTIN HOFFINGER, P. ADELBERG	:	
AND D. NELSON, AS OFFICERS	:	
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1981	:	
through February 29, 1984.	:	

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Petitioners, Hoffinger Industries, Inc. a/k/a Lomart Industries, Inc., and Martin Hoffinger, P. Adelberg and D. Nelson, as officers, 960 Alabama Avenue, Brooklyn, New York 11207, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1981 through February 29, 1984 (File Nos. 801922, 802021, 802022 and 802023).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on August 30, 1988 at 9:15 A.M., with all documents to be submitted by October 17, 1988. Petitioners Hoffinger Industries, Inc. a/k/a Lomart Industries, Inc. and Martin Hoffinger appeared by Martin Hoffinger. Petitioners P. Adelberg and D. Nelson did not appear. The Audit Division appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether the Audit Division, upon audit, properly determined a use tax liability on certain expense items and other purchases against petitioner Hoffinger Industries, Inc. a/k/a Lomart Industries, Inc., and against petitioners Martin Hoffinger, P. Adelberg and D. Nelson, as persons responsible under Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

1. During the period March 1, 1981 through February 29, 1984 (as well as during periods both before and after such time span) petitioner Hoffinger Industries, Inc. a/k/a Lomart Industries, Inc. ("Lomart") conducted operations in the tool and die business and also in the manufacture and sale of a full line of above-ground swimming pools and related products. Lomart operates manufacturing facilities in Brooklyn, New York, and in Arkansas and California.

2. In or about February of 1985, the Audit Division commenced a field audit of Lomart's business operations. The auditors visited Lomart's business premises at 960 Alabama Avenue, Brooklyn, New York and, after reviewing Lomart's books and records, determined there were insufficient documents to conduct a detailed audit of its expense purchases. More specifically, the

auditors did not have available a complete set of purchase invoices such that verification of the payment of tax (or proper non-payment) on such purchases could be made. Accordingly, the auditors decided to utilize a test period, specifically the month of January 1983, to analyze Lomart's purchases and determine a percentage of error in the payment of tax on such purchases.<sup>1</sup>

3. The test period analysis resulted in a disallowance percentage (error rate in payment of tax on purchases) of .05565 percent. This error rate was applied to expense purchases for the entire audit period, in the categories hereinafter specified, to arrive at the calculation and assessment of additional tax liability.

4. On March 19, 1985 and March 20, 1985, respectively, the Audit Division issued to petitioner Lomart separate notices of determination and demands for payment of sales and use taxes due, assessing tax due in the aggregate amount of \$33,772.12 for the period March 1, 1981 through February 29, 1984, plus penalty (Tax Law § 1145 [former (a)(1)]) and interest. These notices of determination and demands were based upon the aforementioned field audit work performed by the Audit Division. Consents extending the period of limitations had been executed allowing assessment for the period spanning March 1, 1981 through November 30, 1981 to occur at any time on or before March 20, 1985.

5. In addition to the aforementioned notices of determination and demands, additional identical notices of determination and demands were issued to the individual petitioners, Martin Hoffinger, P. Adelberg and D. Nelson, assessing tax liability identical to that assessed against the corporate petitioner both as to amount and as to period. Petitioners P. Adelberg and D. Nelson did not appear either in person or by an authorized representative at hearing.

6. The Audit Division's assessment of use tax represents tax computed on amounts of purchases and expenses as reflected in Lomart's various expense accounts including data processing expenses, operating supplies, office supplies, automobile and truck expenses (including spare part expenses), machinery purchases, heating services (heating oil), expendable tools, and repair and maintenance expenses. The Audit Division also asserted additional tax due on a portion of the electricity used in Lomart's facility.

7. As the result of conferences occurring prior to the hearing, at which times additional substantiation was provided by Lomart, the Audit Division revised its assessment. This revision resulted in a tax due of \$21,687.92, and reflected reductions in the amount of tax originally assessed upon fixed asset acquisitions, specifically for machinery, automobile and truck acquisitions. Just prior to commencement of the hearing, the Audit Division further reduced the assessment to the amount of \$19,934.92. This second reduction was based upon acceptance of documentation provided by Lomart with respect to the category of automobile and truck expenses, including spare parts. Thus, as of the time of hearing, the amount assessed (\$19,934.92) reflected tax calculated on some fifteen categories of expenses for which substantiation (of payment of tax or of non-taxability) had not been furnished by Lomart.

8. Subsequent to the hearing, Lomart submitted additional substantiation (documents) relative to some of the fifteen categories of expense in dispute. After review thereof, the Audit Division further reduced its assessment to \$12,736.02, plus penalty and interest. This reduction arrives at the amount now in contest (\$12,736.02) and consists of the following items:

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<sup>1</sup>Resort to the use of a test period is not challenged by petitioners, it being admitted that not all invoices were available for audit.

ASSESSMENT AS RECOMPUTED POST HEARING

<u>EXPENSE</u>	<u>AMOUNT</u>	<u>TAX</u>
a) Data Processing - Leased		\$32,195.00
b) Data Processing - Rented		24,000.00
c) Outside Services - Heating		20,767.00
d) Repairs & Maintenance		1,000.00
		\$77,962.00    \$ 6,431.86
e) Expendable Tools		\$ 4,136.00
f) Operating Supplies		10,363.00
		\$14,499.00    \$ 579.96
g) Electricity		\$76,933.00    \$ 3,077.00
h) Fixed Assets - Machinery		\$28,910.71    \$ 1,156.43
i) Fixed Assets - Autos/Trucks		18,070.00    1,490.77
Total Tax		\$12,736.02

Items "a", "b", "c", "d", "e" and "g" reflect the same dollar amounts of expense as were disallowed per the original audit. Items "f", "h" and "i" reflect adjustments (decreases) in the amounts originally disallowed, based on documentary substantiation submitted by Lomart post hearing.<sup>2</sup>

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<sup>2</sup>The original and reduced amounts are as follows:

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The balance of items originally disallowed as unsubstantiated were allowed in full based upon the substantiation supplied post hearing.

9. With respect to the remaining expense items held subject to tax, the following presentation was made:

(a) and (b) Data processing - leased and rented (\$56,195.00): Lomart owned certain data processing hardware and in connection therewith leased certain software programs for use in its business. Lomart made lease payments totalling \$56,195.00 which were subjected to tax upon audit by the Audit Division. Lomart provided no explanation as to what the software products were utilized for, but asserted that such lease payments were, upon information and belief, not subject to tax. It was asserted, although unproven, that such programs may have represented custom (as opposed to standard) software packages.

(c) Outside Services - heating (\$20,767.00): Lomart asserted that tax was paid on the purchase of all heating oil and that invoices or confirmation from

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Lomart's heating oil supplier could be supplied subsequent to hearing. The only additional substantiation documents furnished were five invoices from Lomart's oil supplier reflecting purchases of \$5,342.46 and indicating tax paid thereon in the amount of \$440.76. It appears no credit was allowed upon audit review of these five invoices.

(d) Repairs and Maintenance (\$1,000.00): Lomart offered no specific evidence or argument, stating simply that this was a "negligible amount".

(e) Expendable Tools (\$4,136.00): Lomart maintains this item represents an extrapolation based upon one purchase invoice in the amount of \$62.05 from Diamond Hardware. Lomart maintains that sales tax was charged on all such purchases. Specific proof thereof, including a copy of the noted \$62.05 invoice, was not submitted.

(f) Operating Supplies (\$10,363.00): Lomart asserts that tax was paid upon the acquisition of all of such supply items, but that it had been unable to secure invoices to substantiate all of such payments. Lomart noted that such purchases were made, in the main, from local supply houses, and asserted tax was always charged by such supply houses. Credit was given, upon audit review, to the extent of all documentary substantiation furnished.

(g) Electricity (\$76,933.00): Lomart paid tax at the rate of 4¼% (New York City rate) on electricity consumed, apparently treating all electricity as having been used in manufacturing. Upon audit, the Audit Division imposed additional tax at the rate of 4 percent on a portion of Lomart's electricity purchases, deeming such portion of total electricity to have been consumed in nonmanufacturing uses. More specifically, of Lomart's total purchases of electricity (\$271,971.00), the Audit Division subjected approximately 28.3 percent (\$76,933.00) to tax at the additional 4 percent rate. By contrast, Lomart asserts that 38,000 out of 40,000 square feet of space in its facilities was used in manufacturing, with only 2,000 square feet used for administration, and thus maintains only 2½ percent of total electricity charges should be subjected to tax at the additional 4 percent rate. Thus Lomart asserts that only about 10 percent of the amount subjected to additional tax by the Audit Division ( $\$76,933.00 \times .10 \text{ percent} = \$7,693.30$ ) should be subject to tax at the additional 4 percent rate.

(h) and (i) Fixed Assets - Machinery, Autos and Trucks (\$46,981.71): Lomart presented items of substantiation subsequent to hearing for which the Audit Division made adjustment to the extent verifiable. The balance of such expenses remaining at issue herein are sought by Lomart on the basis of general assertions of nontaxability including intracompany transfers and/or erroneous accounting entries.

10. The Audit Division asserts that the two petitioning officers other than Martin Hoffinger should be held in default for non-appearance. However, the Audit Division conceded, at the same time, that those reductions to the corporate assessment made both prior to and after hearing, as well as any further reductions to such corporate assessment occurring as the result of these proceedings, would inure to the benefit of such two named officers as well as to petitioner Martin Hoffinger.

CONCLUSIONS OF LAW

A. The only issue presented for resolution is whether petitioner Lomart has furnished evidence substantiating either that (a) tax was not due on the items of expense remaining at issue (see \_\_\_ Finding of Fact "8[a] through [i]") or, (b) if due, tax was paid. There is no quarrel raised with the Audit Division's use of test period auditing techniques, it being admitted that supporting documentation (i.e., all invoices) necessary to enable a complete, detailed audit was not available at the time of audit.

B. It is clear that petitioners bear the burden of providing records or other evidence sufficient to show that tax was paid on all taxable items or, alternatively, to prove that those items upon which no tax was paid were, in fact, not taxable (Tax Law § 1132[c]). Petitioners asserted that documents in substantiation, not provided to the auditor at the time of audit, could and would be provided on some or most of the items in question subsequent to hearing.

C. Subsequent to the hearing, documents with regard to some of the items in question were submitted. In turn, the Audit Division allowed credit and reduced the assessments based on such documents to the extent verifiable (see \_\_\_, Finding of Fact "8"). In fact, 6 of the 15 categories at issue at the time of hearing were accepted by the Audit Division as substantiated completely. Further review herein indicates that additional reduction should be allowed to the extent of tax paid on "outside services - heating", as supported by invoices submitted (see \_\_\_, Finding of Fact "9-[c]"). Such invoices show tax paid in the amount of \$440.76, and the assessment is to be reduced by such amount. However, petitioners have failed to meet their burden of proving that any additional allowances against the assessment should be made. The evidence presented is not sufficiently specific or complete to support Lomart's allegations as set forth in Finding of Fact "9". Accordingly, the assessment, as reduced by the Audit Division to \$12,736.02, and as further reduced hereby to \$12,295.26 (\$12,736.02 - \$440.76), is sustained.

D. Petitioners P. Adelberg and D. Nelson, as officers, are hereby held in default for failure to appear. However, in accordance with the Audit Division's statement (see \_\_\_, Finding of Fact "10"), the notices issued against such petitioners are to be reduced to \$12,295.26.

E. The petitions of Hoffinger Industries, Inc. a/k/a Lomart Industries, Inc., and Martin Hoffinger, as officer, are granted to the extent indicated in Conclusion of Law "C", but are in all other respects denied, and the notices of determination and demands issued on March 19, 1985 and March 20, 1985 against each of the four named petitioners, as reduced in accordance herewith, are sustained.

DATED: Albany, New York  
January 6, 1989

/s/ Dennis M.

Galliher \_\_\_\_\_  
ADMINISTRATIVE LAW JUDGE